No. 89-673

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN YIAMOUYIANNIS,

Petitioner

v.

PAUL THOMPSON, EXPRESS NEWS,
BEXAR COUNTY MEDICAL SOCIETY and
DR. RANDALL PREISSIG,

Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Texas

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BRIEF IN OPPOSITION OF RESPONDENTS BEXAR COUNTY MEDICAL SOCIETY AND DR. RANDALL PREISSIG

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QUESTION PRESENTED

The only question presented is:

Whether the Texas intermediate appellate court incorrectly applied the *Gertz* privilege of constitutionally protected opinion to the statements at issue in this case?

LIST OF PARTIES

1. John Yiamouyiannis
2. Paul Thompson
3. Express News
4. Bexar County Medical Society
5. Dr. Randall Preissig

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Respondents Bexar County Medical Society and Dr. Randall Preissig respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion of the Fourth Court of Appeals of Texas. That opinion appears in the Appendix to the Petition for Writ of Certiorari and is reported at 764 S.W.2d 338 (Tex. App.—San Antonio 1988, writ denied).

CONSTITUTIONAL PROVISION INVOLVED

Petitioner failed to set forth the First Amendment to the United States Constitution, which is at issue in this appeal and which provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

STATEMENT OF THE CASE

The lower court's opinion, which is appended to the Petition for Writ of Certiorari, correctly describes this summary judgment case; however, Petitioner's Statement of the Case contains some inaccuracies and omissions which merit correction. Although the merits of fluoridation of water are entirely irrelevant to this petition, it is a complete misstatement to say that Defendants ever conceded the scientific issue that fluoride is a "poison" and further to imply that defendants therefore could have had no "opinion" contrary to the position of Yiamouyiannis.

In addition, Petitioner fails to make clear what language the intermediate Texas appellate court held to be constitutionally protected opinion and what language it held to fall outside opinion, necessitating a reversal of part of the summary judgment and remand for trial. The court held that the use of the terms "quack," "quackery," "outrageous hoke artist," "imported fearmonger," lack of "solid credentials" and "incomprehensible mumbo jumbo" were vintage hyperbole expressing an opinion not capable of proof; therefore, an absolute constitutional privilege applied. *Yiamouyiannis v. Thompson*, 764 S.W.2d 338, 341 (Tex. App.—San Antonio 1988, writ denied). The court specifically exempted from constitutional protection the statement that Yiamouyiannis once headed a group that opposed vaccines for smallpox and polio and pasteurization of milk because such was a verifiable statement that could easily be proven true or false. *Id.* at 341. Throughout the petition, Yiamouyiannis uses this statement as part of his argument that this Court should grant review because the state appellate court improperly applied *Gertz*. The Texas appellate court did not improperly apply *Gertz*; rather, it properly distinguished factual statements which could constitute defamation from constitutionally protected opinion which is not actionable as defamation.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I. The decision of the Texas appellate court partially affirming the summary judgment does not conflict with decisions of this Court or other federal circuit courts interpreting constitutionally protected opinion under *Gertz*.

A. *The lower court correctly applied the test for constitutionally protected opinion.*

Although Respondents would not disagree with the statement that "truth should always be the objective of the courts and the efforts of the media," it is not a reason for granting certiorari in this case. The question is whether the intermediate Texas appellate court applied the constitutional privilege accorded opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), in such a way as to conflict with an opinion of this Court or any other federal court of appeal. Petitioner has cited no opinions with which the Texas court's opinion conflicts; nor has Respondents' research located any. To the contrary, many cases, both state and federal, support the Texas court's application of the *Gertz* privilege to use of the terms quackery, hoke artist, fearmonger, lacking in solid credentials, and incomprehensible mumbo jumbo.

The starting point for the Texas appellate court's analysis was the following *Gertz* statement of the privilege accorded opinion:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

Supra at 339-40.

The lower court then analyzed this opinion privilege under a fairly widely adopted test set forth in a D.C.

Circuit Court of Appeals case upon which writ of certiorari was denied by this Court. *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985); *see also City of Dallas v. Moreau*, 718 S.W.2d 776 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.); *El Paso Times, Inc. v. Kerr*, 706 S.W.2d 797 (Tex. App.—El Paso 1986, writ ref'd n.r.e.), *cert. denied*, 480 U.S. 932 (1987).

Petitioner set forth the four-step test in his petition at page 7. A shorthand method of describing the four steps would be:

(1) common usage or precise meaning

(2) verifiability

(3) immediate context

(4) broader social context

Those statements that the court held to be constitutionally protected opinion are such under each of the above criteria and are supported by ample case law. This Court's opinion in *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264 (1974), is illustrative of the first step of the test. In that case, this Court characterized the term "fascist" as a use of loose, figurative language or an undefined slogan, which was not a fact and therefore not actionable. *Id.* at 284; *see also Good Government Group of Seal Beach, Inc. v. Superior Court of Los Angeles County*, 586 P.2d 572 (Cal. 1978) (statements like "chicanery and machinations" and "infamy" are terms often used in a spirited debate where the integrity and motives of rivals are attacked and defended and are therefore opinion, not fact), *cert. denied*, 441 U.S. 961 (1979).

The *Ollman* court demonstrated the second step of the test, verifiability, with the following example. An evaluative statement like "Jones is a despicable politician" reflects the author's political, moral or aesthetic views and

not the author's sense perceptions. An example of a sense perception which is a recitation of facts would be "Jones had ten drinks at the office and then sideswiped two cars on the way home." *Ollman*, *supra* at 978. The first statement about Jones' political abilities cannot be objectively characterized as true or false, any more than the statements in this case concerning Yiamouyiannis' position on the merits of fluoridation can be. *See Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.), *cert. denied sub nom. Hotchner v. Doubleday & Co.*, 434 U.S. 834 (1977) ("toady hypocrite" and "two-faced person whom Hemingway did not trust" were not assertions that could be proved true or false; therefore, could not be libelous). Those statements held by the lower court to be protected opinion are evaluative statements expressing an opinion on Yiamouyiannis' political stance on a public issue and are therefore not defamation.

As a third step, the full context in which the statements were made is considered. In *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970), a newspaper article described a land developer's negotiating technique at a city council meeting as "blackmail." This Court held that the statement "blackmail" was clearly the author's use of rhetorical hyperbole to express his personal opinion or characterization of what he considered to be unreasonable behavior on the plaintiff's part. *Id.* at 14. As the lower court noted in the instant case, the article in question is filled with rhetorical hyperbole and figurative language, which is used in an attempt to persuade the reader to Thompson's point of view and which is not capable of proof one way or the other. The very use of hyperbole signals to a reader that opinion is being communicated and not verifiable facts. *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219, 228 (2d Cir. 1985).

The fourth and final step is to consider the broader social context in which the statement appears. Again, this

Court's opinion in *Letter Carriers, supra,* is a good example of this stage of the analysis. In *Letters Carriers,* a union published in its monthly newsletter under the heading of "List of Scabs" the names of those who had not joined the union. A Jack London definition of "scab" as a traitor to God, his country, his family, and his class was also given. *Id.* at 267-78. This Court held that the definition of "scab" could not be construed as a representation of fact because in the give-and-take of economic and political controversies, such expressions were often used in the figurative sense to demonstrate one party's strong disagreement with the views of its opposition. Even though very pejorative, the use of the term "scab" reflected a difference of opinion and, thus, was protected by the First Amendment. *Id.* at 284; *see also* Note, *Fact and Opinion After Gertz v. Robert Welch, Inc.: The Evolution of Privilege,* 34 Rutgers L. Rev. 81, 111, 117 (1981) (in context of a public dispute, audience can place such exaggerated positions in perspective or at least view them with a degree of skepticism as attempt to persuade to certain viewpoint). Undeniably, the referendum debate on whether flouride should be added to San Antonio's drinking water supply was a heated debate—a context in which the average reader expected that each side would attack the other in an effort to win over converts and voters. *See Rinsley v. Brandt,* 700 F.2d 1304, 1309 (10th Cir. 1983) (society has chosen to protect as opinion free and heated debate about matters of social concern). In sum, the Texas intermediate appellate court correctly analyzed and applied the *Gertz* privilege for opinion and correctly separated actionable fact from nonactionable opinion in its review and partial affirmance of the trial court's summary judgment.

B. *Because as a matter of law opinion cannot constistitute defamation, the issues of absence of malice, truth as a defense, and public figure standard were properly never reached by the lower court.*

Petitioner also attempts to argue that defendants did not meet their summary judgment burden of proof because they failed to prove that Yiamouyiannis was a public figure, that the statements were true, and that there was no malice, no negligence and no conspiracy. As an initial matter, the Texas court of appeals held that Petitioner waived any appellate complaints regarding causes of action for negligence or conspiracy by failing to assign points of error to such. *Yiamouyiannis, supra* at 341-42. Second, defendants did not have a burden to show that Yiamouyiannis was a public figure or that the statements were true because such issues were never reached. The decision that the *Gertz* privilege protects opinion statements is a threshold one, the result of which is a determination as a matter of law that no defamation exists. Thus, there is no reason to determine the standard—be it public figure or private person—to be applied to a defamation cause of action. Similarly, there is no reason to establish the defense of truth to a cause of action for defamation, which as a matter of law is not actionable.

Last, Respondents need not have established the absence of malice because that issue also is not reached. Petitioner confuses the absolute privilege of *Gertz* with a conditional privilege, which may be overcome by a showing of malice. The constitutional protection afforded opinion by *Gertz* is absolute and is not overcome by malice, as was made clear in *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41, 49-50 (1988).

II. This Court has previously answered all of the "Questions Presented" by Petitioner in such a way that denial of this Petition for Writ of Certiorari is undeniably warranted.

Petitioner attempts to argue that defendants did not disagree with Yiamouyiannis' opinions regarding flouride and therefore by publishing statements critical of his position had published a "false" opinion. First, the record in no way reflects that defendants agreed with his position; nor in fact did they. Second, the question of motive behind the opinion is not an inquiry under *Gertz* or the *Ollman* test for applying the *Gertz* privilege. This Court has plainly answered Petitioner's first two questions regarding whether *Gertz* absolutely protects opinion and whether false opinion can be published. *Gertz* states there is no such thing under the First Amendment as a false idea—"idea" having been subsequently and widely interpreted to be synonymous with the term "opinion."

Petitioner's third and fourth questions regarding whether *Gertz* allows publication of opinion statements regardless of malice was answered by this Court in *Hustler Magazine v. Falwell* in the following manner:

> But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), we held that even when a speaker or writer is motivated by hatred or ill-will his expression was protected by the First Amendment.
>
> * * * *
>
> At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. The freedom to speak one's mind is . . . essential to the common quest for truth and the vitality of society as a whole.

485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41, 49-50 (1988).

Petitioner's final question assumes facts which neither exist in this case, nor are they relevant; and more importantly, it is not a question for judicial resolution since courts of law have never undertaken to declare what can and what cannot be a public issue.

CONCLUSION

Yiamouyiannis' Petition for Writ of Certiorari should be denied. The Texas court of appeals did not err in holding that certain statements were constitutionally protected opinion; nor is the lower court's decision clearly contrary to any rulings of this Court. Respondents Bexar County Medical Society and Dr. Randall Preissig, therefore, respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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